Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

MARIE ESTELA ESCANDON DE AUERBACH,
LUIS AUERBACH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to equitable jurisdiction principles, Federal Courts have the right to review collateral due process attacks on any Drug Enforcement Agency ("DEA") administrative forfeiture action. Since its inception centuries ago, the Due Process clause has protected people's property from unfair governmental interference and also guaranteed fair procedures in cases involving the federal government. The Eleventh Circuit nonetheless held in this case that the DEA was not required to initiate judicial forfeiture proceedings with respect to approximately $640,000 of Claimant's money despite the fact that Claimant's wife (who is a citizen and resident of Mexico with limited English skills) had submitted her claim (along with her husband's claim form) opposing the administrative forfeiture within the time frame the DEA had allowed her husband.

The questions presented is whether the DEA's non-judicial forfeiture of claimant's funds complied with the due process rights requirements in light of the fact claimants had submitted a "claim" for their seized funds within the time period allotted by the DEA.

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Petitioners respectfully petition for a writ of certiorari to Review the judgment of the United States Court of Appeals For the Eleventh Circuit in this case.

OPINIONS BELOW

The court of appeals' unpublished opinion (per curiam) granting respondent's Motion to Dismiss is attached here to as Appendix A. The district court's unpublished order and judgment, dated February 27, 2003, are attached as Appendix B.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 16, 2003. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 983, *et seq.*

STATEMENT OF THE CASE

Petitioners had over $600,000 wrongfully seized from them by the DEA and this money was then administratively forfeited despite petitioners filing a "claim" for the money within the allotted time period. The District Court held that no manifest injustice would result in denying Petitioners' request that it exercise equitable jurisdiction in order to prevent Petitioners' money from being forfeited without a hearing. The Eleventh Circuit then affirmed the Trial Court's ruling by holding that "an unreasonable seizure does not rise to the level of a callous disregard for constitutional rights."

The Court of Appeals holding merits this Court's immediate review because it allows the Government to capitalize upon Petitioner's confusion and inability to navigate the labrynthian-like maze of the DEA's administrative process. In addition, the decision below conflicts with decisions in other circuits holding that the DEA has a duty to refrain from following through with an administrative forfeiture in a situation where a claimant has indicated he is confused regarding how to proceed in getting his money back.

1. Petitioners are citizens and residents of Mexico with rudimentary English language skills. They own an import/ export company that purchases various products here in the United States and re-sells them in Mexico. Neither Petitioner has any criminal convictions and neither has ever been involved in drug trafficking or money laundering. Nevertheless, Petitioners had $640,000 of their money wrongfully seized from them. The money was ultimately forfeited to the government after the DEA refused to consider their claim opposing the forfeiture that was sent in under Petitioner Escandon's name but within Petitioner Auerbach's time period.

2. Respondent is the United States Government (the DEA). It is undisputed that Respondent seized (and ultimately forfeited) a large amount of Petitioner's money despite Petitioner's attempts to oppose the claim within Petitioner Auerbach's time frame. Of particular note, Respondent has not demonstrated any link between the seized money and drugs; which is usually a prerequisite to having the seized money forfeited.

3. The District Court rejected Petitioner's request to exercise equitable jurisdiction in this case based upon Petitioner's collateral due process attack on the administrative forfeiture proceeding. The District Court held that its review "was not necessary to prevent a manifest injustice."

The District Court felt that the DEA's notices were adequate under the circumstances and was not convinced that Petitioner Escandon's filing of a claim within her husband's allotted time frame (along with her husband's claim form) showed that Petitioners were confused by the process. As a result, the District Court granted the Government's Motion to Dismiss; thereby affirming the forfeiture of Petitioner's funds.

4. On Petitioner's appeal, the Eleventh Circuit, in a brief two-page (per curiam) opinion affirmed the lower Court's dismissal holding that Respondent's seizure of Petitioner's money, without any evidence linking it to drugs, did not rise to "a level of callous disregard for constitutional rights". The Appeals Court apparently felt that this type of an unreasonable seizure is not tantamount to a "callous disregard" for Petitioner's constitutional rights.

Lacking in the Eleventh Circuit's opinion was any discussion regarding the apparent confusion Petitioner's suffered from regarding the administrative forfeiture process and the failure of the DEA to address this confusion before "liberating" Petitioner's money.

5. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

The Petition should be granted because the Eleventh Circuit's decision conflicts with holdings of other circuits in that it fails to recognize that the DEA's administrative forfeiture provisions can be confusing to non-citizens in fact, Petitioners were clearly confused in this instance) and that the DEA should not be allowed to enrich itself on the basis of this confusion.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FIFTH, EIGHTH AND TENTH CIRCUITS

As noted by the district court in the instant case, the decision to invoke equitable jurisdiction is highly discretionary and should be exercised with caution and restraint. *Richey v. Smith*, 515 F.2d 1239, 1243-45 (5th Cir. 1975). Accordingly, such jurisdiction is only appropriate in exceptional cases where equity demands intervention. *In re One 1983 Mercedes Benz Automobile VIN No. WDBCB20A9DB041960*, Misc. No. 1664, slip op. at 4. In *Richey*, the former Fifth Circuit outlined several considerations that should guide the discretion of a district court in exercising equitable jurisdiction: (1) whether the government agents seized the property in "callous disregard for the constitutional rights" of the petitioner; (2) whether the petitioner has an individual interest in and need for the material he seeks to have returned; (3) whether the petitioner would be irreparably injured by denial of the return of the property; and (4) whether the petitioner has an adequate remedy at law. 515 F.2d at 1243-44. *In re One 1983 Mercedes Benz Automobile VIN No. WDBCB20A9DB041960*, Misc.

No. 1664, slip op. at 4 n.3; *In re $49,065.00 in United States Currency*, 694 F. Supp. at 1560 (1988); *$89,000 v. Ricon*, 691 F. Supp. 1411, 1414 (1988). Enveloping all of these factors are the basic equitable considerations of whether the Petitioners' conduct and the merits of their position require judicial review to prevent manifest injustice. *See Richey*, 515 F.2d at 1245 (exercise of equitable jurisdiction may be justified if Petitioners' allegations are substantiated).

In the case at hand, the district and appellate court erred in failing to consider the factors outlined in *Richey*. First, it is axiomatic that each of us, including non-citizens, have a right to be free from unreasonable seizures of our property. Petitioners' money was seized based solely upon a positive canine alert. However, because this money originated from the border region of Southern California, this positive alert has no probative value because it is common knowledge (and has been for quite some time) that money from the Southern California area typically contains trace amounts of drug residue which canines will alert on. *See United States v. $49,576 U.S. Currency*, 116 F.3d 425, 427 (9th Cir 1997).

Without any other evidence linking this money to drugs, the government cannot prove a nexus between the same by a preponderance of the evidence as required by 18 U.S.C. § 983(c)(1). In other words, the government needs more than a positive dog sniff to declare this money forfeited. If the DEA could point to a criminal conviction in this matter or a past criminal conviction or had they found drugs on Petitioners at the airport, then possibly the government could meet its burden. But the DEA has none of this. Petitioners' allegations that they have *never* been convicted of drug smuggling, money laundering, etc., and have never been

involved in any fashion with drugs are all facts that can be substantiated.

Unfortunately, the district and appellate court failed to consider Petitioners' allegations in this regard. Because these allegations are true the seizure by the DEA of Petitioners' money constitutes a "callous disregard for the constitutional rights" of the Petitioners and it was an abuse of discretion to not exercise equitable jurisdiction in this case.

Second, the money seized by the DEA represented the bulk of Petitioners' business capital. They obviously need (and have needed for quite some time) for this money to be returned in order for their business to survive. It is clear that a small company, such as the Petitioners' company, would be irreparably injured by the denial of the return of this money. Finally, there is no other adequate remedy law except for the return of this money; thus, the final three prongs of the *Richey* test are satisfied in this case.

A. THE DEA'S SEIZURE VIOLATED PETITIONERS' DUE PROCESS RIGHTS

In a forfeiture proceeding, due process requires that notice be reasonably calculated, under all the circumstances, to apprise the party of the action against them and afford the opportunity to object. *United States v. Woodall*, 12 F.3d 793, 798 (8th Cir 1993). In a situation where the owners of the seized property have put the DEA on notice that they are seeking return of property and that he/she may have misunderstood the administrative requirements, due process requires more. *See Scarabin v. Drug Enforcement Admin.*, 919 F.2d 338 (5th Cir 1990) (DEA may not ignore citizen's response to seizure notice, even if technically in error, where response contains the

necessary information); *see also Aero-Medical, Inc. v. United States*, 23 F.3d 328, 330-31 (10th Cir. 1994) (it is unreasonable for the DEA to ignore its actual knowledge that notice is inadequate even if notice is otherwise technically adequate).

In *Scarabin*, the petitioner operated a fuel dock and marine supply business in Louisiana. On June 1, 1990, the DEA raided the marina and found two marijuana cigarette butts on the premises but not in the vicinity of *Scarabin*. *Scarabin* was arrested and charged with possession of marijuana, but the charges were dismissed for lack of evidence.

At the time of *Scarabin's* arrest, the sheriff seized $12,360 in cash for him and turned it over to the DEA for forfeiture as proceeds from drug deals. On July 2, 1990, the DEA sent a Notice of Seizure to *Scarabin* outlining alternative procedures available for contesting the forfeiture. Additionally, the notice was published on July 11, 1990 in USA Today.

On July 25, 1990, *Scarabin* filed a motion with the DEA for expedited release of the money. Based on a technicality, the motion was denied by the DEA because expedited release was appropriate only for funds seized for possession of personal use quantities of drugs and *Scarabin's* money was seized as purported proceeds of drug sales. Because the DEA had no other petitions or actions filed by *Scarabin* in the matter, the DEA administratively forfeited the funds to the United States pursuant to 21 U.S.C. § 881 and 19 U.S.C. §§ 1607 and 1608. On November 5, 1990, *Scarabin* filed a petition for review.

The Appellate Court determined that it had jurisdiction to review the DEA's administrative forfeiture of *Scarabin's*

property. The court was extremely critical of the DEA's summary dismissal of *Scarabin's* claim simply because it was not in the proper form: "The facts of this case illustrate the ordinary citizen's worst nightmare and his attorney's worst fears of the morass of unreviewable, short-fused administrative regulatory practice. It is the perfect case for big government to be big hearted and big enough to return ill-gotten gains to the rightful owner rather than unjustly enrich itself on the basis of a technical 'gotcha.'" *Scarabin*, *supra*, at 339.

Just like it did in *Scarabin*, the DEA ignored the fact that the wife (Escandon) had sent in a claim for the money (along with her husband's notice), within the time frame allotted for her husband to file a claim. Rather than attempt to eliminate this confusion, the DEA summarily forfeited the money and informed Escandon that she was out of luck. To say that the government has unjustly enriched itself with Petitioners' money is a gross understatement.

The case of *Muhammed v. Drug Enforcement Agency*, 92 F.3d 648 (8th Cir. 1996) is also dispositive. In *Muhammed*, the claimants filed an action against the DEA for return of cash seized from them at the airport. Pursuant to a declaration by a DEA agent that claimants had administratively forfeited the cash, the DEA filed a motion to dismiss the complaint. The district court granted the DEA's motion and the Petitioners appealed. The Court of Appeals reversed and remanded based upon, *inter alia*, the inadequacy of the notice provided to claimants.

The court in *Muhammed* relied heavily on the fact the Muhammeds were confused by the notice provided to them by the DEA; which was evidenced by their reliance upon a lawsuit they had filed to stop the administrative forfeiture process. (*Id.* at 653). The court also considered the fact that no criminal charges had ever been brought against the Petitioners and that

the fact the evidence the government was using to discredit the Muhammed's was sparse:

> We are therefore faced with a seemingly baseless government seizure of its citizens' cash currency. Because of, and with actual notice of, the Muhammeds' evident confusion, the DEA administratively forfeited at least $70,990 of the cash. We realize that the war on drugs has brought us to the point where the government may seize up to $500,000 of a citizen's property, without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. See 19 U.S.C. §1609. Because the courts have little authority to review the merits of an administrative forfeiture directly, [FN7] it is all the more important that the citizen be adequately apprised of exactly what he or she needs to do to regain his or her property. Although some case law indicates that initiation of administrative forfeiture may successfully oust citizens pending motion for return of the property until the administrative procedures have been complied with, the DEA notice is not at all clear on this point. We conclude, therefore, that here, at least, where the agency was on notice that the Muhammeds were confused as to this point and not only in need of, but requesting, clarification, the agency had a duty to refrain from further action until tender of the requested information. Thus, the administrative forfeiture is void because of

> inadequate notice given to the Muhammeds. *Woodall*, 12 F.3d at 795.

Id. at 653.

Like the Plaintiffs in *Muhammed*, the Petitioners in the instant case have no criminal record, were not arrested or prosecuted and were confused (as evidenced by the fact that Petitioner Escandon sent in the claim with Petitioner Auerbach's notice from the DEA) by the administrative forfeiture process. Once the DEA received a claim from Mrs. Escandon, that was sent along with Mr. Auerbach's original notice from the DEA, during the claim period encompassing Mr. Auerbach's right to contest, it had a duty to refrain from further action until it clarified the situation with the Petitioner. While Ms. Escandon's claim form was technically a day late, this was an understandable error brought on only by the inadequacies of the DEA's notices to the Petitioners (i.e. written in English and providing not one, but two, different time frames in which the Petitioners could send in a claim contesting the administrative forfeiture). Equity is sometimes tolerant of errors. *In re Harper*, 835 F.2d 1273, 1274 (8th Cir. 1988). Petitioners submit that this is a case where the district court abused its discretion by not recognizing Petitioners' confusion and finding that the administrative forfeiture was void under the circumstances.

B. THIS COURT SHOULD SET ASIDE THE DECLARATION OF FORFEITURE AND ORDER RETURN OF PETITIONERS' MONEY

The proper remedy in successful collateral attacks on forfeiture proceedings is to "set aside the forfeiture". *United States v. Schinell*, 80 F.3d 1064, 1069 (1996). Accordingly, assuming this court agrees with Petitioners in this case, Petitioners respectfully requests an order directing the return of their money, along with interest and costs.

CONCLUSION

If Petitioners' money is not returned, a manifest injustice would take place in this case. Petitioners, who have never even been accused of a crime (much less convicted), would have effectively had their money stolen by our government in what essentially amounts to a high stakes "shell" game.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 16, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11538
Non-Argument Calendar

D. C. Docket No. 02-01739-CV-ODE-1

MARIE ESTELA ESCANDON DE AUERBACH,
LUIS AUERBACH,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 16, 2003)

Before CARNES, WILSON and COX, Circuit Judges.

PER CURIAM:

Maria Estela Escandon de Auerbach and Luis Auerbach ("the Appellants") appeal the district court's order granting

the United States' motion to dismiss for lack of subject matter jurisdiction. We affirm.

The Appellants present two issues on appeal: (1) whether the district court erred by refusing to exercise its equitable jurisdiction; and (2) whether the Drug Enforcement Agency ("the DEA") violated their due process rights.

We review de novo an order granting a motion to dismiss. *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 1334 (11th Cir. 2002). We review the district court's decision not to exercise its equitable jurisdiction for an abuse of discretion. *See Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1220 (11th Cir. 2002).

A district court does not have subject matter jurisdiction over agency decisions, except where (1) the agency has refused a request to exercise its discretion, or (2) extraordinary circumstances exist and jurisdiction is necessary to prevent a "manifest injustice." *In re $67,470.00*, 901 F.2d 1540, 1543-44 (11th Cir. 1990). The Appellants have not addressed the first exception. In regard to the second, the Appellants cite *Richey v. Smith*, 515 F.2d 1239 (5th Cir. 1975),[1] which provides a four-factor analysis to guide a court regarding its exercise of equitable jurisdiction. The Appellants argue that the "unreasonable seizure" of their money satisfies the first factor, (Appellants' Br. at 9-10),

1. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981), this court adopted as binding precedent all Fifth Circuit decisions issued prior to close of business on September 30,1981. *Id.* at 1207.

because the DEA agents seized their property in "callous disregard" for their constitutional rights. *See Richey*, 515 F.2d at 1243 (citations omitted).

Even if we assume that the Appellant's contentions are true, we still reject their argument because an unreasonable seizure does not rise to the level of a callous disregard for constitutional rights. We decline the invitation to merge the two concepts, *see id.* at 1243 n. 8, as equitable jurisdiction must be exercised with caution and restraint. *U.S. v. Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999). We therefore reject the Appellant's argument because it fails to meet the four-factor *Richey* analysis,[2] and hold that the district court did not abuse its discretion by refusing to exercise its equitable jurisdiction.

Because the district court did not have subject matter jurisdiction, we do not reach the Appellants' merits-based due process claim.[3]

AFFIRMED.

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2. Because Appellants do not satisfy the first factor, we do not discuss factors two through four.

3. Assuming equitable jurisdiction, the Appellant's due process claim fails for the reasons outlined by the district court. (R-8 at 4-5.)

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION DATED FEBRUARY 27, 2003 AND FILED MARCH 3, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:02-CV-1739-ODE

MARIE ESTELA ESCANDON DE AUERBACH
and LUIS AUERBACH,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

ORDER

This civil matter in which Plaintiffs Maria Estela Escandon de Auerbach ("Escandon") and Luis Auerbach ("Auerbach," and collectively "Plaintiffs") seek the return of assets seized by the Drug Enforcement Agency *("DEA")* is presently before the court on Defendant's motion to dismiss and Plaintiffs' motion to strike extrinsic evidence. For the reasons set forth below, Defendant's motion to dismiss is GRANTED and Plaintiffs' motion to strike is DENIED AS MOOT.

Appendix B

On March 8, 2001, DEA Agents at Atlanta's Hartsfield Airport seized $634,440.00 in United States currency from the luggage of Escandon pursuant to 21 U.S.C. § 881(a)(6). As required by 18 U.S.C. § 983 (a)(1)(A)(I), the DEA sent written notice within sixty days of the seizure to Escandon and Auerbach, her husband, regarding the impending forfeiture proceedings. The personal notice letters were sent certified mail, return receipt requested, to both Escandon and Auerbach at the addresses they provided to the DEA, and included a description of the property seized, the time, place, and cause of the seizure, and delineated the procedure and time for filing an administrative claim.[1] The DEA further sent personal notice letters to Escandon in care of two attorneys — Donald Dunnion and Rosalinda Laguna — who informed the DEA that they were representing Escandon in this matter. Finally, in addition to providing Escandon and Auerbach with personal notice of the administrative forfeiture proceedings, and in order to comply with 19 U.S.C. § 1607(a) and 21 C.F.R. § 1316.75, the DEA provided Plaintiffs with notice by publication in the *Wall Street Journal* on May 7, 14, and 21, 2001.

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1. These notices were sent to Escandon and Auerbach at separate addresses — separate addresses which Plaintiffs themselves provided to the DEA. Each notice expressly stated the deadlines for Plaintiffs to file their claims; Escandon's original deadline was May 29, 2001, but was subsequently extended until June 6, 2001, while Auerbach's deadline was June 11, 2001. More specifically, the DEA sent three personal notice letters to Escandon (none of which were addressed to Auerbach), and two personal notice letters to Auerbach (none of which were addressed to Escandon).

Appendix B

On May 29, 2001, Escandon retained counsel to represent her in the administrative forfeiture proceedings. The DEA received Escandon's claim contesting forfeiture, along with a letter from her counsel, by Express Mail on June 7, 2001. In Escandon's counsel's letter, she acknowledged that the time period in which Escandon could file a claim had been extended to June 6, 2001. The DEA never received a claim for Auerbach.

Therefore, since the DEA did not receive a timely claim from Escandon, and no claim at all from Auerbach, and the time for filing such a claim had expired, the DEA forfeited the money to the United States pursuant to 19 U.S.C. § 1609.

In their complaint, Plaintiffs claim that Escandon was erroneously identified as the sole claimant. *See* Cmpl. at ¶ 4. Plaintiffs further contend that given that *Escandon's* claim was received four days prior to *Auerbach's* deadline, the DEA wrongfully forfeited the money. *See id.* at ¶ 16. As such, Plaintiffs seek the return of $634,000.00, plus interest, and attorney's fees and costs.

The Government responds by moving to dismiss Plaintiffs' claim pursuant to Fed. R. Civ. P. 12 (b)(1) on the grounds that the court lacks subject matter jurisdiction. Defendant argues that district courts may review administrative forfeitures for procedural adequacy only, not the merits of the forfeiture itself. In the alternative, Defendant moves to dismiss based on Fed. R. Civ. P. 12 (b)(6) on the grounds that Plaintiffs fail to state a claim upon which relief can be granted.

Appendix B

In their opposition to the Government's motion to dismiss, Plaintiffs claim that based on Auerbach's notice, they believed that June 11, 2001 was the last date to file a claim. According to Plaintiffs, despite receiving separate notices at separate addresses, they made no "true distinction" between the time deadlines to file claims given them by the DEA as individuals. *See* Pls.' Opp. at 4; *see also* Escandon Decl. at 2. Plaintiffs also reiterate that in the claim form sent to the DEA, counsel erroneously identified only Escandon as the claimant. *See* Pls.' Opp. at 4. Additionally, Plaintiffs contend that by rejecting Escandon's claim for being one day late, the DEA ignored the "acknowledged 6/11/01 date in which the government could officially declare the money forfeited," and did "nothing to clear up Plaintiff's confusion in connection with the process." *See* Pls.' Opp. at 4. This error, Plaintiffs argue, was "understandable" and only precipitated by the "inadequacies" of the DEA's notice, namely that it was in English and the deadline for Escandon to file her claim was unclear. *See id.* at 7.

The court first turns to the Government's motion to dismiss. It is generally recognized that district courts retain jurisdiction to determine whether the agency followed the proper procedural safeguards only, but lack jurisdiction to review the merits of the agency forfeiture decision itself. *See, e.g., In re $67,470.00*, 901 F.2d 1540, 1543 (11th Cir. 1990). There are, however, two limited exceptions to the general rule: (1) federal courts may have jurisdiction over an agency forfeiture decision when an agency has refused a request to exercise its discretion; and (2) federal courts may exercise equitable jurisdiction over agency forfeiture decisions. *See id.* at 1544.

Here, despite Plaintiffs' bare allegations to the contrary, the record shows that Plaintiffs both individually received adequate notice through the mail and by publication. The court finds Plaintiffs' arguments that notice was somehow inadequate because they did not "view the notices sent to them as individual notices," and that the notices themselves were in English, unpersuasive and disingenuous. Indeed, as the court previously noted, it was Plaintiffs who provided the DEA with separate addresses to which notice was to be mailed.[2] Further, notice in English clearly comports with the requirements of procedural due process. *See, e.g., Toure v. United States*, 24 F.3d 444, 446 (2d Cir. 1994). Thus, the court finds that the DEA followed the proper procedural safeguards by providing Plaintiffs with sufficient notice of the impending forfeiture proceedings.

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2. The court is particularly troubled by Plaintiffs' counsel's suggestion that prior counsel merely "erroneously" left Auerbach's name off of the claim sent to the DEA contesting forfeiture, and that counsel misunderstood the June 6, 2001, deadline by which Escandon's claim should have been received by the DEA. *See* Pls.' Opp. at 4. In fact, counsel's letter to the DEA dated May 29, 2001, unequivocally states that she represents Escandon — and that Escandon is contesting the forfeiture — and makes no mention of Auerbach. *See* Def.'s Mot. at Ex. 12. Counsel's letter to the DEA further acknowledges that the deadline for Escandon to file her claim was June 6, 2001, and contrary to counsel's representations in the pleadings submitted to the court, gives no indication of any confusion regarding such deadline. *See id.* The court strongly cautions Plaintiffs' counsel that under Fed. R. Civ. P. 11(b), by presenting to the court a pleading, counsel certifies that all allegations and factual contentions have "evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. P. 11.

Appendix B

The court also finds that neither jurisdictional exception permits it to review the merits of the DEA's forfeiture decision. First, it does not appear from the record that the DEA refused a request to exercise its discretion. Indeed, in order to invoke this exception, Plaintiffs must either make specific allegations showing a refusal to consider their claim, or the Government must concede that the application was not properly considered. *See In re $67,470.00*, 901 F.2d at 1544. Here, the Government makes no such concession, and Plaintiffs make no allegations regarding the DEA's refusal to exercise its discretion. Though Escandon's claim was rejected because it was one day late, the DEA informed Plaintiffs' counsel that Escandon had the option of submitting a petition for remission or mitigation of forfeiture, and Escandon apparently chose not to do so. *See* Def.'s Mot. at Ex. 14.

Second, the court declines to exercise equitable jurisdiction over Plaintiffs' motion to return the seized property. The decision to exercise equitable jurisdiction is "highly discretionary and must be exercised with caution and restraint." *United States v. Eubanks*, 169 F.3d 672, 674 (11th Cir. 1999). As such, equitable jurisdiction is "only appropriate in exceptional cases where equity demands intervention." *In re $67.470.00*, 901 F.2d at 1545. In this case, the court's review is not necessary to prevent a manifest injustice. Plaintiffs both individually received adequate, lawful notice that explicitly detailed the procedure and time for filing a claim. Despite this notice, Plaintiffs failed to file their claims before the prescribed deadline. Now, Plaintiffs claim that the notices were inadequate because they were unclear and in English. The court is unconvinced.

Therefore, having determined that notice was sufficient, and declining to exercise equitable jurisdiction, the court finds that Plaintiffs' complaint should be dismissed for lack of subject matter jurisdiction. Accordingly, Defendant's motion to dismiss [#4] is GRANTED. Plaintiffs' motion to strike [#5] is DENIED as moot.

SO ORDERED, this 27 day of February, 2003.

s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:02-cv-1739-ODE

Marie Estela Escandon de Auerbach and Luis Auerbach,

Plaintiffs,

vs.

United States of America,

Defendant.

JUDGMENT

This action having come before the court, Honorable Orinda D. Evans, United States District Judge, for consideration of defendant's motion to dismiss, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 27th day of February, 2003.

LUTHER D. THOMAS
CLERK OF COURT

Appendix B

By: s/ Frances M. McNulty
Frances M. McNulty, Deputy Clerk

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Deputy Clerk